Filed 2/26/19 Roy v. Davis CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

DAVID ROY, Plaintiff and Appellant, v. BRENDA DAVIS, Defendant and Respondent.	C081865 (Super. Ct. No. 14-CV-08979)

California's anti-SLAPP statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike, unless the court determines . . . there is a probability that the [party] will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).)[1] Plaintiff David Roy appeals from the order denying his special

[1] Undesignated statutory references are to the Code of Civil Procedure. Section 425.16 is commonly referred to as the anti-SLAPP statute. "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

motion to strike defendant Brenda Davis's cross-complaint under the anti-SLAPP statute. We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Roy and Davis had a long-term relationship but were never legally married. They met in 2000 while working at Pelican Bay State Prison. They were both social workers and real estate brokers. According to Roy, he and Davis purchased several properties together over the course of their relationship.

After their relationship ended in May 2014, Davis sought a domestic violence restraining order against Roy based on his threatening and harassing conduct from late May 2014 to July 14, 2014, including threats to physically harm her and destroy her career by reporting work-related misconduct (inappropriate relationship with a former prisoner) if she did not comply with his demands for money, property, and her dog.[2] Among other things, Roy told Davis that "he was going to wage war against [her]," that her "whole life [was] at risk," and that her "conduct [would] receive consequences." He also warned her that she "could lose everything" (including her license to practice as a social worker) if she did not marry him and "put him on [her] properties." Roy threatened to report Davis's alleged misconduct to the media, her family, the Attorney

[2] Davis filed her request for a restraining order on July 15, 2014. She sought an order preventing Roy from contacting her, her family, her employer, the Board of Behavioral Sciences, the Attorney General's Office, the Department of Corrections and Rehabilitation, and the media. She also sought an order directing Roy to, among other things, stop harassing, threatening, and stalking her. She requested Roy be required to stay at least 50 yards from her, her properties, her workplace, her vehicle, and her dog. She also requested an order directing Roy not to destroy her reputation, to stop using a private investigator to find out information about her, and to complete an anger management program.

General's Office, the Board of Behavioral Sciences, and her supervisor. Following a hearing on September 5, 2014, Davis's request for a restraining order was granted.[3]

The day before the hearing on Davis's request for a restraining order, Roy filed the underlying "*Marvin*" action (*Marvin v. Marvin* (1976) 18 Cal.3d 660) against Davis, seeking damages and division of property the couple had accumulated during their relationship. Over a year later, Davis filed a cross-complaint alleging a claim for intentional infliction of emotional distress,[4] which was predicated on essentially the same conduct underlying her request for a restraining order. The cross-complaint detailed Roy's threatening and harassing conduct, including his threat to report Davis to various third parties (e.g., media, Attorney General's Office, Board of Behavioral Sciences) if she did not meet his demand for $200,000, half of her real property, and her dog.

On January 12, 2016, Roy filed a special motion to strike the cross-complaint under the anti-SLAPP statute. Roy argued, among other things, that the cross-complaint should be stricken because it was based on activity protected under the statute; specifically, statements he made about his duty to report her work-related misconduct and statements he made in anticipation of filing this action. He requested attorney fees and costs under section 425.16, subdivision (c)(1).

Davis did not file an opposition to Roy's motion. Instead, she voluntarily dismissed her cross-complaint with prejudice. Thereafter, the trial court issued a tentative ruling denying the motion as moot based on the voluntary dismissal. In so

---

[3] The appellate record does not include a written order or a reporter's transcript showing that the trial court granted Davis's request for a restraining order. The parties, however, agree that the request was granted.

[4] Davis concedes that she failed to obtain leave of court prior to filing her cross-complaint in violation of section 428.50. (See § 428.50, subds. (a), (c) [requiring leave of court to file a cross-complaint where cross-complaint was not filed at the same time as the answer to the complaint].)

ruling, the court found that Roy was not entitled to an award of attorney fees and costs because he was not the prevailing party, reasoning that "[a] voluntary dismissal does not provide a sufficient basis for a fee award; the trial court is required to rule on the merits of the anti-SLAPP motion in making a prevailing party determination." (Italics omitted.)

At the hearing on the anti-SLAPP motion, Roy argued that his motion was not moot and requested a ruling on the merits so that he could file a motion for attorney fees and costs. After hearing oral argument, including defense counsel's argument that Roy engaged in extortionate conduct that is not protected activity under the anti-SLAPP statute, the trial court confirmed its tentative ruling and found that Roy was not entitled to an award of attorney fees and costs because he failed to show he would have prevailed on the merits of his motion, and because the cross-complaint was dismissed for reasons unrelated to the merits—Davis's realization that she filed the cross-complaint without obtaining leave of court in violation of section 428.50. This appeal followed in April 2016 and briefing was completed in September 2018.

DISCUSSION

1.0 Applicable Law and Standard of Review

"A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. ' "While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions . . . and not to vindicate a legally cognizable right." ' " (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.)

The Legislature enacted the anti-SLAPP statute to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of

speech and petition for the redress of grievances. (§ 425.16, subd. (a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) The anti-SLAPP statute "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) It is broadly construed so as to protect the constitutional rights of petition and free speech. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199.)

The anti-SLAPP statute applies to "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).) As used in the statutory scheme and as relevant here, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: . . . any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body" or "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(2) & (4).)

["S]tatements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest." (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.) Moreover, " 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], [and] such statements are equally entitled to the benefits of section 425.16.' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) "Accordingly, although litigation may not have commenced, if a statement 'concern[s] the subject of the dispute'

and is made 'in anticipation of litigation "contemplated in good faith and under serious consideration" ' [citation] then the statement may be petitioning activity protected by section 425.16." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268.)

SLAPP suits may be disposed of summarily by a special motion to strike under section 425.16, commonly known as an "anti-SLAPP motion," which is "a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc.*, *supra*, 35 Cal.4th at p. 192.) In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. First, the moving party must establish that the challenged claim arises from activity protected by the anti-SLAPP statute. Second, if the moving party makes the required showing, the burden shifts to the nonmoving party to demonstrate the merit of the claim by establishing a probability of success. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) Only a claim that satisfies both parts of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

A moving party who prevails on a special anti-SLAPP motion is entitled to recover attorney fees and costs incurred in connection with the motion. (§ 425.16, subd. (c); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1382-1384.) The award of fees and costs is mandatory. (§ 425.16, subd. (c)(1).)

We review the trial court's ruling on an anti-SLAPP statute de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) "Thus, our review is conducted in the same manner as the trial court in considering an anti-SLAPP motion." (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672.) We apply our independent judgment to determine whether the challenged claim satisfies both prongs of the statute. (*Tutor–Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 610.)

2.0 Analysis

Roy contends the trial court erred in ruling that his anti-SLAPP motion was moot. Roy further contends the court erred in ruling that he was not entitled to attorney fees and costs because he failed to demonstrate he would have prevailed on the merits of his motion. According to Roy, Davis's intentional infliction of emotional distress claim arose from activity protected by the anti-SLAPP statute; namely, statements he made in connection with anticipated litigation to enforce his contractual rights, and statements covered by the whistleblower statute. We find no basis for reversal.

When, as here, a party voluntarily dismisses their complaint after an anti-SLAPP motion has been filed but before the trial court rules on the merits of the motion, the court lacks jurisdiction to strike the complaint. The court, however, retains jurisdiction to determine whether the moving party is entitled to an award of attorney fees and costs under section 425.16. (See *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 876-880; *S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 381, fn. 2; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 908, fn. 4.)

In *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, the court ruled that the prevailing party after a voluntary dismissal will ordinarily be the dismissed party, but the "critical issue is which party realized its objectives in the litigation." (*Id*. at p. 107.) The *Coltrain* court noted that the nonmoving party may be able to overcome the presumption that the moving party is the prevailing party by demonstrating that it dismissed the case for reasons unrelated to success on the merits, such as substantial achievement of the litigation goals through settlement or other means. (*Ibid.*)

The majority of courts to consider this issue, however, have rejected the suggestion in *Coltrain* that a trial court may award attorney fees and costs to the moving party pursuant to section 425.16, subdivision (c)(1) without first determining whether he or she would have prevailed on their special motion to strike. (*Tourgeman v. Nelson &*

Kennard (2014) 222 Cal.App.4th 1447, 1457; see *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc*. (2004) 122 Cal.App.4th 1049, 1056; *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218-219; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 752.) In *Liu*, the court held that a party "who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the [party's] motion for attorney's fees and costs under subdivision (c) of that section." (*Liu, supra,* at p. 751; accord, *Pfeiffer Venice Properties*, *supra*, at pp. 218-219 [anti-SLAPP defendants "were entitled to a ruling on the merits of their SLAPP motion, the result of which will necessarily determine their right to attorney fees under section 425.16, subdivision (c)"].)

Here, the record reflects that the trial court took both lines of cases into account when it denied Roy's request for attorney fees and costs under section 425.16.[5] However, because we agree with *Liu* and the courts that have followed *Liu*, we limit our review to the merits of the anti-SLAPP motion.

---

[5] We reject Davis's contention that Roy's appeal should be dismissed as "procedurally deficient" because he did not appeal from a motion denying attorney fees and costs. A party filing an anti-SLAPP motion may claim attorney fees and costs as part of the motion itself or through the filing of a subsequent motion or cost memorandum. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320.) Here, the trial court denied Roy's anti-SLAPP motion as moot based on the voluntary dismissal of the cross-complaint and determined that he was not entitled to an award of attorney fees and costs because he failed to show he would have prevailed on the merits of his motion. Roy was entitled to appeal from the order denying his anti-SLAPP motion and seek reversal of the order to pursue attorney fees and costs. (See *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1365; § 425.16, subd. (i) [order granting or denying anti-SLAPP motion is appealable].)

We also reject Davis's contention that Roy's anti-SLAPP motion was untimely because he failed to file the motion in response to Davis's request for a restraining order. Davis did not raise this issue below and has not cited any authority demonstrating that Roy's motion was untimely under the circumstances of this case.

A moving party meets its anti-SLAPP burden by demonstrating that the act underlying the nonmoving party's claim " 'fits one of the categories spelled out in section 425.16, subdivision (e).' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "[T]he critical point is whether the [nonmoving party's] cause of action itself was *based on* an act in furtherance of the [moving party's] right of petition or free speech." (*Ibid*.) At this step, we do not assess the merits of the pleaded claim, but simply identify whether the alleged conduct falls within the statutory definition of protected activity. (*Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 54-55.) In making this determination, we do not focus on the form of the nonmoving party's claim but rather the moving party's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 92.) In reviewing an order denying an anti-SLAPP motion, we accept as true the nonmoving party's pleaded facts and evidence favorable to the nonmoving party. (*Flatley*, *supra*, 39 Cal.4th at p. 326; see *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 849 [in reviewing an order denying an anti-SLAPP motion, we primarily review the complaint; however, we also review papers filed in connection with the motion to the extent that they might give meaning to the words in the complaint].) To satisfy his or her burden at the first step, the moving party must make a prima facie showing that their alleged actions fall within the ambit of the anti-SLAPP statute. (*Flatley*, *supra*, at p. 317.)

We conclude the trial court did not err in finding that Roy was not entitled to an award of attorney fees and costs under section 425.16. Roy failed to establish that he would have prevailed on the merits of his anti-SLAPP motion. He did not carry his burden to show that Davis's intentional infliction of emotional distress claim arose from activity protected under the anti-SLAPP statute. A review of the cross-complaint discloses that Davis's claim is based on Roy's threatening and harassing conduct after

their relationship ended. Specifically, Davis alleged that Roy threatened to stop by her house on multiple occasions and had her "under surveillance by her groundskeeper." He also told her that he had hired a private investigator to monitor her activities, and had videos, recordings, and pictures of her that were made/taken without her knowledge. She further alleged that Roy had threatened to harm her and destroy her career if she did not give him money ($200,000), property (e.g., half her real properties), and her dog. The allegations in the cross-complaint and the evidence submitted in connection with the anti-SLAPP motion show that Roy threatened to report Davis's alleged work-related misconduct (inappropriate relationship with a former prisoner) to the media, the Attorney General's Office, the Board of Behavioral Sciences, her family, and her supervisor. He also threatened to tell her family "what a terrible person she was."

The anti-SLAPP statute does not apply to Roy's alleged harassing conduct. (See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2005) 129 Cal.App.4th 1228, 1250 [harassing conduct—defined as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose"—is not constitutionally protected activity].) Nor does the statute apply to his threats of physical harm[6] or his threats to report Davis's alleged work-related misconduct if she did not comply with his demands for money and property. Regardless of whether Roy is entitled to recover money and/or property from Davis in the underlying *Marvin* action and regardless of whether Davis committed work-related misconduct, Roy's threat to harm Davis and expose her alleged

---

6 The First Amendment does not protect true threats—"statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black* (2003) 538 U.S. 343, 359 [155 L.Ed.2d 535]; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*., *supra*, 129 Cal.App.4th 1228 at p. 1250 [unlawful violence and credible threats of violence are outside the protection of the First Amendment].)

wrongdoing, coupled with his demands for money and property, constitute criminal extortion as a matter of law, which is not protected by the anti-SLAPP statute. (*Flatley*, *supra*, 39 Cal.4th at p. 328 ["Extortion is not a constitutionally protected form of speech."].)

We reject Roy's contention that his conduct does not constitute extortion as a matter of law. "Extortion has been characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of themselves, may not be illegal. '[I]n many blackmail cases the threat is to do something in itself perfectly legal, but that threat nevertheless becomes illegal when coupled with a demand for money.' " (*Flatley*, *supra*, 39 Cal.4th at p. 326.) Additionally, "threats to do the acts that constitute extortion under Penal Code section 519 are extortionate whether or not the victim committed the crime or indiscretion upon which the threat is based and whether or not the person making the threat could have reported the victim to the authorities or arrested the victim." (*Flatley*, at p. 327.)

Penal Code section 518 defines criminal extortion as "the obtaining of property or other consideration from another, with his or her consent, . . . induced by a wrongful use of force or fear . . . ." (Pen. Code, § 518, subd. (a).) Fear, for purposes of criminal extortion, may be induced by a threat to "do an unlawful injury to the person or property of the individual threatened" or "expose . . . a deformity, disgrace, or crime" or "expose a secret affecting [the person]." (Pen. Code, § 519, subds. 1, 3, 4.) Criminal extortion occurs when one of the statutorily defined threats is accompanied by a demand for property or payment of money to prevent the threatened conduct. (*Flatley, supra*, 39 Cal.4th at p. 332, fn. 16.)

In *Flatley*, an attorney was sued by a well-known entertainer for civil extortion, intentional infliction of emotional distress, and other claims. (*Flatley*, *supra*, 39 Cal.4th at p. 305.) The lawsuit was based on a letter and telephone calls made by the attorney

which demanded money to settle claims that the entertainer had raped the attorney's client. (*Id*. at pp. 307-311.) The attorney's threats were not limited to filing a lawsuit but also contained threats of disseminating information about the rape and unspecified violations of other laws to the media if a seven-figure payment was not made. (*Ibid*.) Under these circumstances, the court concluded that the attorney's conduct was extortion as a matter of law and not protected activity under the anti-SLAPP statute. (See *id*. at pp. 328-331.)

Similarly, in *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, the court found a former employee's action against his employer's attorney for various claims, including civil extortion and intentional infliction of emotional distress, was not subject to a special motion to strike. (*Id*. at pp. 802, 806-807.) In *Mendoza*, the employer's attorney threatened to report the former employee to enforcement agencies and otherwise expose alleged crimes unless the employee paid damages exceeding $75,000. In denying the anti-SLAPP motion, the court explained that "[t]he threat to report a crime may constitute extortion even if the victim did in fact commit a crime. The threat to report a crime may in and of itself be legal. But when the threat to report a crime is coupled with a demand for money, the threat becomes illegal, regardless of whether the victim in fact owed the money demanded. [Citation.] ' "The law does not contemplate the use of criminal process as a means of collecting a debt." ' " (*Id*. at p. 805.)

Other appellate decisions have also found it proper to deny a special motion to strike based on extortionate conduct. (See *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, 1411, 1423-1424 [extortionate threat by former employee to report former employer's chief executive officer to federal authorities for submitting false billings unless he negotiated a settlement of the former employee's claims]; *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 317-318 [extortionate threat to pursue State Bar complaint

unless attorney signed off on a settlement check was not protected activity under anti-SLAPP statute].)

On this record, the trial court properly denied Roy's special motion to strike. As discussed, Roy's threatening and harassing conduct was not protected activity under the anti-SLAPP statute. Roy's contention that he did not engage in activity that constitutes extortion as a matter of law lacks merit. In the trial court proceedings, Roy did not deny that he demanded money and property from Davis. Nor did he deny that he threatened to harm Davis and destroy her career by exposing her alleged misconduct with a former prisoner if she did not comply with his demands.

Because Roy did not carry his burden to show that Davis's claim arose from protected activity, we need not and do not decide whether Davis demonstrated a probability of prevailing on the merits. Therefore, we do not address Roy's contention that Davis cannot make this showing because his conduct was privileged under the litigation privilege. (See *Flatley*, *supra*, 39 Cal.4th at p. 323 [noting that the litigation privilege is relevant to the second step in a court's analysis of an anti-SLAPP motion in that the litigation privilege may prevent a party from demonstrating that it can prevail on a claim].)

DISPOSITION

The trial court's order denying Roy's anti-SLAPP motion is affirmed. Costs on appeal are awarded to Davis. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, Acting P. J.

We concur:

MURRAY, J.

DUARTE, J.